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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID THOMAS DUQUETTE, Defendant and Appellant.	G041484 (Super. Ct. No. 04WF1861) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

There are few areas of the law more dependent upon the sound discretion of the trial judge than criminal sentencing. And the decision about whether or not to admit a criminal defendant to probation is so loosely circumscribed as to be almost entirely discretionary. California law provides that, "If the court determines that there are circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be served by granting probation to the person, it may place the person on probation." (Pen. Code, § 1203, subd. (E)(3).)

Unwritten, but clearly implied in that sentence, is the phrase "or it may not." "Probation is an act of leniency, not a matter of right." (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 365.) And appellate courts, having not a human being before us but a written record, overturn such decisions only when they "'exceed[] the bounds of reason.'" (*People v. Warner* (1978) 20 Cal.3d 678, 683, quoting *People v. Giminez* (1975) 14 Cal.3d 68, 72.) Appellant David Thomas Duquette contends this is such a case, but we cannot agree.

FACTS

David Thomas Duquette went to a Home Depot store and replaced the price code label of a $170 toilet with one he had removed from a $20 toilet. Then he removed a price sticker from his back pocket and put it onto a $589.54 tool box. When he then checked out, these two items, whose true value was over $750, were rung up as a $93 sale. He paid that amount and left the store. Home Depot personnel arrested him in the parking lot.

When searched, he was found to have labels, several Home Depot receipts, and a pocketknife, with bits of cardboard stuck to the blade. The pocketknife became more explicable when it was discovered that the expensive toolbox had a hole cut in the cardboard where its price would have shown. Appellant first denied any wrongdoing, but later confessed to switching the labels on the toilets.

After a jury found him guilty of both commercial burglary and grand theft, the trial court sentenced Appellant to two years in state prison – the midterm for that offense – and stayed the grand theft punishment pursuant to Penal Code section 654.

DISCUSSION

Appellant contends the trial court should have sentenced him to probation. Indeed, he contends the state prison commitment was so unreasonable as to amount to an abuse of discretion. As indicated above, we disagree.

Appellant has a dismal record, which goes back to 1977. That record includes a felony conviction for grand theft in 1991, for which he was sentenced to state prison and actually served five years before parole. Another of his crimes was a violation of knowingly removing a manufacturer's serial number or identification mark (Pen. Code, § 537e). In 2004, he was convicted of stealing from a store in Utah. In 2005, he suffered his second felony conviction, this time for petty theft with a prior theft-related conviction. The victim in that case was another Home Depot, and one of the terms of his probation in that case, a probation he was still serving when he committed this crime, was that he stay out of Home Depot stores. Finally, while on bail in this case, he was convicted of another petty theft with a prior.

Against this record, the court could weigh letters from appellant's mother and brother relating that appellant was the product of a broken and abusive home and had suffered a brain injury in 2003. A psychiatrist opined that appellant was "very impaired," but did not question his competence to stand trial nor to appreciate the nature of his crimes.

Furthermore, this was a crime of considerable sophistication and contemplation. Appellant did not just walk into the Home Depot and steal things. He went in with a pocketknife and several UPC bar codes of the type used by the store. While he merely exchanged bar codes on the toilets, he used one that he had pre-prepared

or pre-obtained to accomplish his theft of the expensive tool box, and cut out that part of the box in which it came that showed its true price.

The trial court was thus confronted with a fairly sophisticated theft that had required considerable preparation. It was committed by someone who had not only stolen before, but had used similar modus operandi to accomplish his thefts, and had previously spent five years in prison for grand theft. What's more, he was not only on probation, *for the fourteenth time in 30 years* (five of which he had spent in prison), but on probation for a similar crime, committed against the same victim, Home Depot. One of his conditions of probation was that he not go into a Home Depot store.

It is difficult to imagine what a probationary grant might accomplish here. While appellant argues – to our amazement – that all the factors listed in the court rules pertaining to him as an individual, *including his record*, militate in favor of probation, he does so unconvincingly. The trial court acted well within its discretion here; indeed a probationary grant would have come closer to an abuse of discretion than its denial. The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.